Federal Court of Appeal | Cour d'appel fédérale

Date: 20250117

Docket: A-255-22

Citation: 2025 FCA 13

CORAM: **RENNIE J.A.**
MACTAVISH J.A.
MONAGHAN J.A.

BETWEEN:

BNSF RAILWAY COMPANY

Appellant

and

GREATER VANCOUVER WATER DISTRICT, CANADIAN NATIONAL RAILWAY COMPANY AND CANADIAN TRANSPORTATION AGENCY

Respondents

Heard at Vancouver, British Columbia, on December 12, 2023.

Judgment delivered at Ottawa, Ontario, on January 17, 2025.

REASONS FOR JUDGMENT BY: MONAGHAN J.A.

CONCURRED IN BY: RENNIE J.A.
MACTAVISH J.A.

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REASONS FOR JUDGMENT

MONAGHAN J.A.

[1] BNSF Railway Company (BNSF) owns a railway track and related railway facilities on land on the Tilbury Island Spur in Delta, British Columbia.

[2] The Greater Vancouver Water District (District) is responsible for acquiring, supplying and distributing water to residents of Vancouver and the surrounding areas, including the City of Delta. In connection with these responsibilities, the District owns and operates watermains that transport potable water to a chamber partially located on BNSF's right of way.

[3] The River Road Main East Watermain (East watermain) and the River Road Main West Watermain (West watermain) transport water from that chamber to Delta residents. The East watermain, authorized by a 1979 agreement between BNSF and the District, does not cross BNSF's railway tracks, but lies under BNSF's right of way and runs alongside the tracks. The West watermain crosses under the BNSF tracks close to the chamber.

[4] In 2018, the District completed construction of a new chamber that is not on BNSF's land. However, as a result, the District sought to reroute a portion of the East watermain. Specifically, the District proposed to (i) construct a new tie-in elbow to redirect piping north to the new chamber; (ii) abandon part of the existing East watermain; and (iii) modify the existing chamber by sealing off its connection to the abandoned part of the East watermain (collectively, the rerouting works). The rerouting works would be undertaken on BNSF's railway right of way, between 10 and 13 metres north of BNSF's railway tracks.

[5] On application, the Canadian Transportation Agency (Agency) may make an order authorizing the construction of a "suitable…utility crossing or related work" if the parties are unable to negotiate an agreement, or an amendment to an agreement, providing for its construction: *Canada Transportation Act*, S.C. 1996, c. 10, s. 101(3). The Agency may also

apportion the construction costs: *Canada Transportation Act*, s. 101(4); *Railway Safety Act*, R.S.C. 1985, c. 32 (4th Supp.), s. 16(1).

[6] In 2021, the District applied to the Agency for authorization to complete the rerouting works. In its application, the District explained that the 1979 agreement authorized the existing East watermain, but the District was unable to come to an agreement with BNSF concerning the rerouting works.

[7] In response, BNSF submitted that the East watermain is not a "utility crossing" as defined in the *Canada Transportation Act* because it does not cross BNSF's tracks. Moreover, BNSF said that the 1979 agreement contemplates the rerouting works. Accordingly, the Agency had no authority over the District's application.

[8] The Agency disagreed with BNSF: Decision No. 102-R-2022 (Decision).

[9] The Agency found that the East and West watermains are utility lines and the rerouting works are related works: Decision at para. 21. The Agency then noted that section 100 of the *Canada Transportation Act* defines "utility crossing" as "the part of a utility line that passes over or under a railway line". Relying on *Canadian Pacific Railway Co. v. Canada (Transportation Agency)*, 2008 FCA 42 [*ATCO*] and previous Agency decisions, the Agency concluded that "'railway line' in section 100…is intended to include land on the railway company's right of way that is contiguous to its tracks": Decision at para. 22. Accordingly, the Agency found it had authority over BNSF's right of way.

[10] Moreover, the Agency characterized the rerouting works as "a new project that was not contemplated by the [1979 agreement]": Decision at para. 26.

[11] Thus, the Agency concluded, it had authority to decide the District's application: Decision at para. 27. It found the rerouting works suitable and authorized the District to construct and maintain them at the District's cost: Decision at paras. 36, 38.

[12] BNSF appeals the Decision on the basis the Agency had no jurisdiction to decide the application. In particular, while BNSF takes no issue with the Agency's finding that the rerouting works are suitable, it asserts that only a utility line—here, the watermain—that crosses railway tracks qualifies as a "utility crossing" under the *Canada Transportation Act* and the Agency erred in interpreting "utility crossing" otherwise. Moreover, BNSF says the Agency erred in concluding that the 1979 agreement did not apply to the rerouting works.

[13] For the reasons that follow, I would dismiss the appeal.

I. Appealing Agency Decisions and the Standard of Review

[14] Under the *Canada Transportation Act*, an Agency decision may be appealed only on a question of law or jurisdiction and only with leave of this Court: s. 41(1). The Agency's findings or determinations of fact within its jurisdiction are binding and conclusive: *Canada Transportation Act*, s. 31.

[15] Statutory appeals require a reviewing court to apply the appellate standard of review: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para. 37 [*Vavilov*]. That standard is correctness for questions of law: *Housen v. Nikolaisen*, 2002 SCC 33 at para. 8.

[16] This Court granted BNSF leave to appeal the Decision. Nonetheless, when hearing the appeal, we must be satisfied we have jurisdiction to address the issues raised in light of the limitations on the right of appeal: *Canadian National Railway Company v. Emerson Milling Inc.*, 2017 FCA 79 at para. 56.

[17] Statutory interpretation is a question of law. Thus, the Agency's interpretation of the *Canada Transportation Act* can be appealed and is reviewable on a correctness standard.

[18] However, contract interpretation is a question of mixed fact and law that requires the principles of contractual interpretation to be applied to the words of the written contract, considered in light of the facts: *Sattva Capital Corp. v. Creston Moly Corp*., 2014 SCC 53 at paras. 50, 53 [*Sattva*]. Therefore, absent an extricable question of law, no appeal lies from the Agency's interpretation of a contract.

[19] Before describing the issues BNSF raises on this appeal, I will describe the role of the parties to this appeal other than BNSF and the District.

II. Parties to the Appeal

[20] In its application to the Agency, the District named the Canadian National Railway Company (CN) as a party. CN objected on the basis that, although the District would require access to CN's land to perform the rerouting works, that work would have no contact with its track or right of way. The Agency disagreed, concluding CN was a proper party: Decision at paras. 13-15. While CN is named as a respondent in BNSF's notice of appeal, it did not participate.

[21] The Agency has the right to be heard on an appeal of an Agency decision: *Canada Transportation Act*, s. 41(4). The Agency participated in this appeal but confined its submissions to legal principles, with the exception of its submissions on costs. Appropriately, it did not attempt to justify the Decision.

III. The Appeal: Issues and the Parties' Positions

A. *The 1979 Agreement*

[22] There is no dispute that if the 1979 agreement applies, the Agency has no authority to decide the District's application. However, the Agency concluded the 1979 agreement did not apply: Decision at paras. 25-27.

[23] BNSF submits that the Agency erred in its interpretation. In particular, BNSF alleges that although the terms "reconstruct", "maintain" and "repair" appear in that agreement, the Agency

did not consider whether installing the tie-in elbow fell within those terms, individually or collectively. In BNSF's view, the rerouting works fall clearly within these terms and, properly interpreted, the 1979 agreement applies.

[24] While the District disagrees the Agency erred, it says the Agency's interpretation of the 1979 agreement is a question of mixed fact and law, and BNSF has not raised an extricable question of law. Accordingly, the District submits the Agency's interpretation of that agreement is not reviewable on this appeal.

[25] However, the District agrees that the Decision should be set aside if the Agency erred in concluding it had jurisdiction to decide the application based on its interpretation of the provisions of the *Canada Transportation Act*. In those circumstances, the District says the Agency had no jurisdiction to interpret the 1979 agreement.

B. *Interpretation of the Canada Transportation Act*

[26] BNSF submits the Agency erred in interpreting the definition of "utility crossing" in the *Canada Transportation Act*, and that error led the Agency to err in concluding that it had jurisdiction to decide the District's application. The District disagrees the Agency made any errors.

[27] BNSF says two questions arise from the Agency's interpretation (BNSF's Memorandum of Fact and Law at paragraph 15):

(i) whether the Agency erred in interpreting the "definition of 'utility crossing'…as including a utility line that does not pass over or under a railway line"; and

(ii) whether the Agency erred in interpreting the term "railway line" used in that definition "as including the (entire) parcel of land or right of way upon which railway tracks and facilities are situate".

[28] Although BNSF poses two questions, in my view, there is only one: whether the Agency erred in interpreting "railway line" as used in the definition of "utility crossing" to include the railway right of way. Let me explain why I have come to that conclusion.

[29] The Agency has the power to authorize the construction of "a suitable…utility crossing or related work": *Canada Transportation Act*, s. 101(3). "Utility crossing" means "the part of a utility line that passes over or under a railway line": *Canada Transportation Act*, s. 100, "utility crossing". Although BNSF makes various submissions concerning "part", "passes", "over" and "under", the East and West watermains are each indisputably a utility line—a (water) pipeline: *Canada Transportation Act*, s. 100, "utility line".

[30] The Agency's conclusion that the term "railway line" in the definition of "utility crossing" includes land on the railway company's right of way contiguous to its tracks is what led the Agency to find that it had authority over the railway right of way under subsection 101(3): Decision at para. 22.

[31] The parties do not dispute the East watermain lies under BNSF's right of way. Rather, they disagree on whether "railway line" includes that right of way. If it does, then the East watermain is a utility crossing because it passes under the railway right of way. If it does not, then a second question could arise—whether the rerouting works are a related work to a utility crossing. However, the Agency concluded it had jurisdiction because a railway line includes the railway right of way, so the East watermain is a utility crossing.

[32] I acknowledge that, immediately after stating the East and West watermains are utility lines, the Agency said "the rerouting works are related works…as they are designed to expand the capacity of the *utility lines*": Decision at para. 21 (emphasis added). Clearly, here, the Agency is referring to the two watermains. BNSF says the Agency's authority is over a "utility crossing and related work", so the Agency erred by concluding the work was related to a utility line.

[33] I disagree.

[34] While the Agency's statement is perhaps less precise than ideal, it is not wrong—work related to a utility crossing also relates to a utility line, the former being a *part* of the latter. More to the point, reading paragraphs 21-23 of the Decision, I am satisfied the Agency concluded that part of the East watermain passes under BNSF's "railway line", as the Agency interpreted that term, and thus is a utility crossing. The rerouting works are related to that utility crossing—*i.e.*, to that part of the utility line.

[35] As a result, the only statutory interpretation question we must address is whether the Agency erred in interpreting “railway line”, as used in the definition of “utility crossing”, as including the railway right of way.

[36] BNSF says the answer to this question is yes. While acknowledging that for this purpose “railway line” is undefined, BNSF submits Parliament did not intend that the term include land or the right of way when used in the definition of “utility crossing”.

[37] The District disagrees. It submits the Agency’s interpretation is consistent with the ordinary meaning of “railway line”, the relevant statutory context, and the purpose of sections 100 and 101 of the *Canada Transportation Act*. Accordingly, the District says, applying the proper principles of statutory interpretation, the Agency’s interpretation is correct.

C. *The Agency’s Position on the Appeal*

[38] For its part, the Agency says there is a preliminary matter: whether the issues BNSF raises are properly the subject of an appeal in light of the statutorily prescribed appeal rights applicable to Agency decisions. The Agency concedes that its interpretation of the statutory provisions is reviewable on appeal. However, it emphasizes the need to consider the words used in their entire context and grammatical and ordinary sense, harmoniously with the scheme of the legislation, its objects and Parliament’s intention: Agency’s Amended Memorandum of Fact and Law at paras. 8-9.

IV. Analysis

[39] The Agency concluded it had jurisdiction based on its interpretation of "utility crossing" in the *Canada Transportation Act*. In light of the District's submission concerning the significance of that issue to the Agency's jurisdiction to interpret the 1979 agreement, I turn first to the statutory interpretation issue.

A. *Did the Agency Err in Interpreting the Canada Transportation Act?*

[40] BNSF says the text is clear: "railway line" in the definition of "utility crossing" does not include the right of way. Although this interpretation is contrary to that in many Agency decisions and *ATCO*, BNSF says that, in light of *Vavilov*, we should revisit those decisions.

[41] However, "past precedents will often continue to provide helpful guidance": *Vavilov* at para. 143. Given its similarity to this case, *ATCO* provides more than helpful guidance. It is a highly persuasive precedent. As I will explain, aside from arguing that the standard of review of Agency decisions has changed, BNSF offers little rationale for its interpretation of "railway line" as used in the definition of "utility crossing" and for departing from past precedent.

[42] The goal of statutory interpretation is to determine what Parliament intended by examining the text, context and purpose of the legislation at issue. While the term "railway line" is ambiguous, my examination of the context—including the overarching scheme governing federal railways and the constitutional constraints—and purpose of the provisions at issue has led

me to conclude Parliament intended that "railway line" in the definition of "utility crossing" include the railway right of way. Accordingly, the Agency did not err in its interpretation.

[43] I turn now to explain why I have come to these conclusions, commencing with an examination of *ATCO*.

(1) *ATCO*

[44] As noted above, the Agency concluded "the term 'railway line' in section 100…is intended to include land on the railway company's right of way that is contiguous to its tracks": Decision at para. 22. In doing so, the Agency referred to its prior decisions, including Decision No. 709-R-2006 [*Agency ATCO*], upheld by this Court in *ATCO*.

[45] The circumstances in *Agency ATCO* are remarkably similar to the facts here. That decision concerned a pipeline company's application to authorize the installation of safety valves on a gas pipeline constructed many years earlier under an agreement with the railway. The work to install the safety valves would be on the railway's right of way, but on a portion of the pipeline that ran alongside, and did not cross, the railway tracks. The railway argued the proposed work was not within the Agency's jurisdiction because the relevant part of the pipeline did not pass over or under a railway line.

[46] The Agency disagreed. It noted that the definition of "utility crossing" in the *Canada Transportation Act* was amended in 1996 to reflect the definition in the *Railway Safety Act*. Under that legislation, which focuses on the safety of railway operations, the Agency said it

"would be untenable" to distinguish between "those crossings which are parallel to a railway line and those which are at right angles to [it]…as both types of crossings involve safety issues": *Agency ATCO* at para. 16.

[47] In the Agency's view, harmony between the *Railway Safety Act* and the *Canada Transportation Act* favoured the Agency having jurisdiction over a pipeline that ran parallel to the tracks. The Agency concluded that any change in wording in the definition of "utility crossing" (from "along or across a railway" to "over or under a railway line") did not reflect a change in the Agency's mandate: *Agency ATCO* at paras. 15-17.

[48] The Agency then observed that while "railway line" is not defined, the definition of "railway" in the *Canada Transportation Act* implied that a railway line includes the land that comprises the right of way: *Agency ATCO* at para. 18. It found support for that conclusion—and therefore that "utility crossing" is intended to include encroachments on the right of way—in *Canadian National Railway Company v. Canadian Transportation Agency* (1999), 251 N.R. 245, 94 A.C.W.S. (3d) 581 [*Yardworks*]: *Agency ATCO* at para. 18.

[49] On the appeal of that decision, this Court described the issue as whether the portions of the pipeline where the proposed work was to be constructed fell within the section 100 definition of "utility crossing". Given the statutory context, including the "substantially…same" definition of "utility crossing" in the *Railway Safety Act*, this Court concluded that the Agency's interpretation was reasonable (the reasonableness standard applied in that case): *ATCO* at

paras. 7, 14, 20-21. That interpretation gave the language in the definition "a meaning that it can reasonably bear and that is consistent with its purpose": *ATCO* at para. 21.

[50] Nonetheless, this Court explained that it would have come to the same conclusion applying a correctness standard of review:

> [22] I would add that I would have proposed the same result if the standard of review had been correctness. I do not accept that Parliament, in the course of enacting the current interrelated statutory schemes for the regulation of railways and railway safety, intended to adopt legislation that would preclude those schemes from applying to the construction of above-ground safety valves on a natural gas pipeline located on a railway right of way.

(2) BNSF's Position on *ATCO*

[51] While BNSF acknowledges the Decision is entirely consistent with *ATCO* and other Agency decisions, it observes that those decisions all predate *Vavilov*. BNSF submits that the Agency's prior decisions, as well as this Court's decisions upholding them, did not undertake a formal statutory interpretation analysis and therefore should be reconsidered: BNSF's Memorandum of Fact and Law at para. 40. Moreover, it says, applying the correctness standard, on this appeal this Court may substitute its views for those of the Agency.

[52] However, as the Agency observed, *Vavilov* did not invalidate prior decisions. BNSF did not persuade the Agency it should revisit its past decisions, or those of this Court, in light of *Vavilov*: Decision at para. 24.

[53] Nonetheless, before us, BNSF submits that this Court would have reached a different conclusion in *ATCO* had the standard of review been correctness and this Court applied the principles of statutory interpretation. It says that, notwithstanding this Court's admittedly *obiter* statement that it would have reached the same conclusion applying a correctness standard.

[54] In these circumstances, it is useful to describe the principles of statutory interpretation and this Court's consideration of them in *ATCO*.

(3) Principles of Statutory Interpretation

[55] As a matter of statutory interpretation, the words of an Act must be read "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, 154 D.L.R. (4th) 193 at para. 21 [*Rizzo*], citing Elmer A. Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983); *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42 at para. 26; *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54 at para. 10 [*Canada Trustco*]; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Directrice de la protection de la jeunesse du CISSS A*, 2024 SCC 43 at para. 23 [*Quebec*].

[56] The Supreme Court of Canada has recently reminded us that legislation must "be given a large and liberal interpretation that will ensure the attainment of its object and the carrying out of its provisions according to their true intent, meaning and spirit": *Quebec* at para. 24 in reference to *Interpretation Act*, C.Q.L.R., c. I-16, s. 41; see also *Interpretation Act*, R.S.C. 1985, c. I-21, s. 12.

[57] Thus, the modern principle of statutory interpretation asks us to examine the text, context and purpose of the legislation to discern its meaning. The text, which is the starting point in any interpretive exercise, always must be given close attention: *Quebec* at para. 24.

[58] However, the relative effects of the ordinary meaning, context and purpose in the interpretive process vary. Where the words of a provision are precise and unequivocal, their ordinary meaning plays a dominant role; where the words are capable of more than one reasonable meaning, the ordinary meaning plays a lesser role: *Canada Trustco* at para. 10.

[59] In *Vavilov*, the Supreme Court explained why it adopted this approach to statutory interpretation:

> [118] This Court has adopted the "modern principle" as the proper approach to statutory interpretation, because legislative intent can be understood only by reading the language chosen by the legislature in light of the purpose of the provision and the entire relevant context: [R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014)], at pp. 7-8. …

And, more recently, "the goal of the interpretive exercise is to find harmony between the words of the statute and the intended objective": *R. v. Breault*, 2023 SCC 9 at para. 26, citing *MediaQMI inc. v. Kamel*, 2021 SCC 23 at para. 39; *Quebec* at para. 24.

[60] Thus, the fundamental objective of statutory interpretation is to determine what Parliament meant.

(4) *ATCO* and the Principles of Statutory Interpretation

[61] Despite BNSF's submissions to the contrary, in my view, this Court's reasons in *ATCO* reflect a consideration of the relevant text, context and purpose, albeit in the context of a reasonableness review of the Agency's interpretation.

[62] Starting with the text, this Court reproduced the relevant *Canada Transportation Act* provisions, including the definitions of "railway", "road crossing", "utility crossing" and "utility line". It also set out the relevant text from the *Railway Act*, R.S.C. 1985, c. R-3, the "statutory predecessor" of Part III of the *Canada Transportation Act*: *ATCO* at paras. 2-5.

[63] On the one hand, in *ATCO* this Court described the railway's argument as one "based on a literal meaning of the words…assuming the words 'railway line' mean only 'railway track' and cannot have a broader meaning": *ATCO* at para. 15. (As described below, *Yardworks*, referenced in *ATCO*, attributed a broader meaning to "railway line" than tracks.) On the other hand, *ATCO* describes the position of the pipeline owner and the Agency as "rel[ying] on the purposive, contextual approach"—that "given the purpose of the statutory scheme and the statutory context, the phrase 'railway line' is intended to include the right of way on which a railway track is located": *ATCO* at para. 16.

[64] Here, implicitly, if not explicitly, *ATCO* recognized the expression "railway line" could have more than one ordinary meaning. In other words, it is ambiguous.

[65] Turning to the context, this Court observed that the "point of statutory interpretation in issue" in *ATCO* required it to consider the *Railway Safety Act*, a related statute: *ATCO* at para. 6. That statute, among other things, establishes railway safety standards for the construction, maintenance and operation of a "railway work". "Railway work" as defined in the *Railway Safety Act* means "a line work or any part thereof, a crossing work or any part thereof, or any combination of the foregoing": s. 4(1), "railway work". This Court noted "railway work" includes any "utility crossing"—a term with "substantially the same" definition in the *Canada Transportation Act*: *ATCO* at paras. 7, 20.

[66] This Court further noted that the Minister of Transport asserted jurisdiction over the proposed construction of the above-ground valves by relying on the definition of "utility crossing" in the *Railway Safety Act*. Thus, if the Agency erred in interpreting "utility crossing", the Minister made the same error. That would raise a question "as to whether and to what extent the *Railway Safety Act* gives the Minister the statutory authority to consider railway safety issues in relation to the proposed work": *ATCO* at para. 20.

[67] Given this context, this Court concluded that the Agency's interpretation was consistent with the purpose of the definition of "utility line" and that Parliament could not have intended the provisions in the *Canada Transportation Act* and related *Railway Safety Act* not to apply to a pipeline located on a railway right of way: *ATCO* at para. 21.

[68] Thus, in my view, *ATCO* reflects a consideration of the text, context and purpose of both the *Canada Transportation Act* and *Railway Safety Act*, although in less detail than BNSF views

as necessary. Consequently, I will review BNSF's submissions regarding what it says is the proper interpretation of the definition of "utility crossing".

(5) BNSF's Submissions on the Interpretation of "utility crossing"

[69] In support of its interpretation, BNSF places significant emphasis on the definition of "railway" in the *Canada Transportation Act*. In particular, it observes that that definition expressly includes "branches, extensions, sidings, railway bridges, tunnels, stations, depots, wharves, rolling stock, equipment, stores, or other ***things*** connected with a railway": *Canada Transportation Act*, s. 87, paragraph (*a*) of "railway" BNSF's Memorandum of Fact and Law at para. 76 (BNSF's emphasis).

[70] The Agency interpreted this language as implying the inclusion of the right of way. BNSF disagrees because the "things listed…are all things constructed or otherwise brought on the land"; and the "list does not include 'land' or 'right of way', both of which are referred to in other sections of the [*Canada Transportation Act*]": BNSF's Memorandum of Fact and Law at para. 80. BNSF asserts that land or the right of way "could have easily been included by Parliament" in the definition of "railway". For its part, the District says the right of way is clearly something connected with the railway.

[71] I first observe that "railway" is not limited to the "things" in the list BNSF relies on. Rather, "railway" is defined as "a railway within the legislative authority of Parliament" and then lists specific inclusions in paragraphs (*a*) and (*b*): *Canada Transportation Act*, s. 87, "railway". However, "includes" is non-exhaustive. Appropriately, BNSF did not suggest Parliament's

legislative authority over a railway does not include authority over the railway right of way: *Attorney General for Alberta v. Attorney General of Canada*, [1915] A.C. 363, [1915] 22 D.L.R. 501 (P.C.) at 506 [*AG Alberta*].

[72] As I understand BNSF's position, the list in paragraph (*a*) of the definition describes what "railway line" means, although found in the definition of "railway". To adopt BNSF's language with modification, had that been intended it "could have easily been so stated by Parliament". Nonetheless, BNSF says *Yardwork*s supports its view.

[73] In that case, this Court considered the meaning of "railway line" in section 98 of the *Canada Transportation Act*. With limited exceptions, section 98 precludes a railway company from constructing a railway line without the Agency's approval. In *Yardworks*, the railway argued that the Agency had no jurisdiction over railway yards because section 98 deals only with railway lines which, the railway submitted, refers only to lines between terminals over which the railway carries out its common carrier obligations, not tracks in its rail yards. The Agency decided otherwise.

[74] In dismissing the railway's appeal of the Agency's decision, this Court said:

> [7] The *Canada Transportation Act* does not define the term "railway line". However, the definition of "railway" and the context of other specific provisions of the Act provide guidance as to what is intended. The words of subsection 98(1) indicate that it is something that is to be constructed. The words of subsection 98(3) envisage the construction of two or perhaps more railway lines within the right of way of an existing railway line and railway lines

> outside the right-of-way but within a 100 m. of the centre line of an existing railway line.
>
> [8] Although references to other provisions of the Act could be made, these are sufficient to indicate what Parliament had in mind. A railway line is the structure upon which locomotives and rolling stock of railway companies move and the communications or signalling system and related facilities and equipment. Colloquially one might refer to "railway tracks", but, of course much more is involved, as C.N.'s counsel indicated, including the provision of grade and subgrade, including the construction of embankments and cuts, the installation of facilities for drainage, bridges, tunnels, and the track structure itself consisting of ballast, ties, rails, spikes, switches, and the like. All these components together, located on the right of way occupied by the railway company are what permit and facilitate the movement of locomotives and rolling stock, namely, a railway line.
>
> [Emphasis added.]

[75] As BNSF points out, *Yardworks*' description of "railway line" focuses on things constructed. However, given the context, this is entirely understandable. *Yardworks* concerned an application to construct railway tracks in rail yards. Whether "railway line" includes the right of way was not germane to that application and *Yardworks* did not address that question.

[76] In contrast, in *ATCO*, the question was squarely before this Court. There, this Court found support for interpreting "railway line" as used in "utility crossing" as including the right of way in the sentence emphasized in the *Yardworks* passage reproduced above: "All these components together, located on the right of way occupied by the railway company are what permit and facilitate the movement of locomotives and rolling stock, namely, a railway line": *ATCO* at para. 17.

[77] BNSF points out that the expression “line of railway”, rather than “railway line”, appears in the definitions of “utility crossing” and “road crossing” in the *Railway Safety Act*. This difference in terminology, BNSF suggests, may be explained by the different objectives of the *Railway Safety Act*—“safety, both during construction and subsequent operation of the crossing”—and the *Canada Transportation Act*—“‘suitability’ of the proposed crossing”: BNSF’s Memorandum of Fact and Law at para. 57; *Railway Safety Act*, s. 3.

[78] However, BNSF does not explain how this difference in language is consonant with these two different objectives. Nor does BNSF tell us the difference, if any, between a “railway line” and a “line of railway”—expressions this Court concluded were substantially the same in *ATCO*.

[79] BNSF further suggests the Minister of Transport may be incorrect in asserting jurisdiction under the *Railway Safety Act*. However, it says that finding the Agency has no jurisdiction under the *Canada Transportation Act* here “does not inevitably mean, without more, that Transport Canada would similarly have no jurisdiction under the safety provisions of the [*Railway Safety Act*]”: BNSF’s Memorandum of Fact and Law at para. 70.

[80] I see no merit to this submission. The definitions in the two statutes are identical but for one referring to a “railway line” and the other to a “line of railway”, terms which would appear to have the same meaning. As noted, BNSF has not explained any meaningful difference between them. Put simply, it is a distinction without a difference.

[81] Importantly, when interpreting a statute, it is appropriate to consider statutes enacted by the same legislature that deal with the same subject matter—here, railways. This is "in keeping with the 'principle of [statutory] interpretation that presumes a harmony, coherence, and consistency between statutes dealing with the same subject matter'": *Schmidt v. Canada (Attorney General)*, 2018 FCA 55 at para. 16, citing *R. v. Ulybel Enterprises Ltd.*, 2001 SCC 56 at para. 52, leave to appeal to SCC refused, 38179 (4 April 2019); see also *Euro-Excellence Inc. v. Kraft Canada Inc.*, 2007 SCC 37 at para. 83; *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, 2012 SCC 68 at paras. 34, 37-38.

[82] Here, both the *Railway Safety Act* and the *Canada Transportation Act* confer authority over railways on the Minister of Transport and the Agency. The two statutes are thus clearly interrelated, particularly in the context of crossings.

[83] Under the *Canada Transportation Act*, the Agency has authority to authorize the construction of a utility or road crossing where the parties cannot come to an agreement concerning its construction. However, if a party is unable to successfully negotiate an agreement apportioning the costs of constructing or maintaining a crossing, subsection 16(1) of the *Railway Safety Act* applies: *Canada Transportation Act*, s. 101(4).

[84] The Agency is empowered to apportion liability for the construction, alteration, operational or maintenance costs of a railway work between the work's proponent and its beneficiaries, if there is no agreement and no recourse is available under Part III of the *Canada Transportation Act* or the *Railway Relocation and Crossing Act*, R.S.C. 1985, c. R-4: *Railway*

Safety Act, s. 16(1). Recall that, as defined, “railway work” includes a “utility crossing” and a “road crossing”, terms which have substantially the same definition in the *Railway Safety Act* as in the *Canada Transportation Act*.

[85] Indeed, it is these “interrelated statutory schemes for the regulation of railways and railway safety” that led this Court to conclude Parliament must have intended them to apply to works on the railway right of way: *ATCO* at para. 22.

[86] In light of this, and the substantially same definitions, “utility crossing” must have the same meaning in both statutes. That meaning must be determined by examining the text, context and purpose.

(6) Application of the Principles of Statutory Interpretation

(a) *Text*

[87] The text is the starting point and, absent statutory definitions, we should focus on the ordinary or “natural” meaning of the text: *Quebec* at para. 28. Here, the parties disagree on the ordinary meaning of “railway line”. Its ordinary meaning is ambiguous.

[88] While BNSF says the ordinary meaning of “railway line” does not include the railway right of way, the District says “railway line” is a broad term and its ordinary meaning includes the railway right of way. In my view, *ATCO* supports the District’s position.

[89] Moreover, adapting the language of *Yardworks*, the right of way enables a railway company to construct the tracks and other supporting infrastructure that comprise the transportation route (*i.e.*, railway line) along which locomotives and rolling stock move.

[90] Statutory interpretation also requires us to look at the French text. While the English definitions of "utility crossing" and "road crossing" in the *Canada Transportation Act* refer to "the part…that passes…over or under a railway line", the French equivalents refer to "franchissement…d'un chemin de fer"—crossing of a railway: *Canada Transportation Act*, s. 100. The term "chemin de fer" is defined in the *Canada Transportation Act*; it is the French equivalent of "railway". Undoubtedly, "railway" and "chemin de fer" include the railway right of way because, as defined, they encompass a railway within the legislative authority of Parliament.

[91] In bilingual legislation, the general rule is to find and apply the shared meaning between the two versions: *R. v. Daoust*, 2004 SCC 6. The test involves determining whether the two versions say the same or different things, and whether either version is ambiguous. Where one version is ambiguous and the other is clear, the clear meaning should be adopted.

[92] Here, the English version is ambiguous because "railway line" is not defined in the *Canada Transportation Act*, but it has more than one ordinary meaning. In contrast, the French versions of the definitions of "road crossing" and "utility crossing" use a defined term that clearly includes the right of way.

[93] Although more properly part of the contextual analysis than the textual analysis, it is convenient here to look at the French and English versions of the same terms in the *Railway Safety Act*. Unlike the definitions of "utility crossing" and "road crossing" in the *Canada Transportation Act*, the French and English versions of the substantially same definitions in the *Railway Safety Act* are more closely aligned with each other. The English refers to "line of railway" while the French refers to "franchissement…d'une voie ferrée"—crossing of a railway line: *Railway Safety Act*, s. 4(1).

[94] The statutory and ordinary meanings of "railway" are undeniably broad. Therefore, which meaning, or part of the definition, applies in particular circumstances must be gleaned from the context and purpose.

[95] In my view, the same is true of the ordinary meaning of "railway line". It is sufficiently broad to include everything necessary for the operation of the trains, which must include the railway right of way. However, depending on the context and purpose, it may be appropriate to give it a narrower meaning.

[96] Yet, for its part, BNSF relies almost exclusively on the text.

[97] While the text is the starting point, the text alone does not tell us what "railway line" means in the definition of "utility crossing". Parliament's intention can be discerned only by reference to the context and purpose.

(b) *Context*

[98] As to context, BNSF says very little:

> 48. Turning to context, in ss. 100 and 101(3) Parliament has balanced the interests of railways and crossing proponents by providing for a review of proposed crossings and granted the Agency the power to approve such crossings where the crossing is "suitable" in the circumstances. No other authority/jurisdiction has been afforded the Agency.

[99] Accepting these statements as true, they do not advance the interpretation exercise. They do not illuminate what "crossing" means or, more to the point, what "railway line" means. They do not tell us why BNSF's interpretation is consistent with Parliament's balancing of interests. Putting it bluntly, BNSF takes us back to the text of sections 100 and 101 notwithstanding that at this stage the issue is context, not text.

[100] As the District points out, the context is broader than sections 100 and 101. It not only includes related provisions of the *Canada Transportation Act*—all of Part III concerns railways—but also those of the *Railway Safety Act*, for reasons I have explained.

(i) Immediate context: sections 100 and 101 of the *Canada Transportation Act*

[101] However, starting with the section 100 definitions, "utility crossing" and "road crossing" encompass not only the part of the utility line or road that passes across (in the case of a road), over or under a railway line, but also any structure supporting or protecting that part of the road

or utility line or facilitating the crossing. It is clear that any such structure need not itself be part of the utility line or road that crosses the railway line for the Agency to have authority.

[102] Similarly, subsection 101(3) permits the Agency to authorize the construction of a "related work" to a suitable utility crossing or road crossing. "Related work" must therefore refer to something more than the part of the utility line or road that crosses the railway line and any structure referred to in the definitions of "utility crossing" and "road crossing".

[103] This context, specific to the issue here, indicates that, when it comes to roads and utility lines, the Agency's jurisdiction extends beyond the part that crosses over or under the railway tracks—it includes utility lines within the right of way.

(ii) Private crossings in the *Canada Transportation Act*

[104] Sections 102 and 103 of the *Canada Transportation Act* also concern crossings, albeit private ones. Section 102 requires a railway company, at a landowner's request, to construct a suitable crossing where the landowner's land is divided as a result of the construction of a *railway line*. The French version refers to "une ligne", and thus is consistent with the English.

[105] Under subsection 103(1), the Agency may order a railway company and "an owner of land adjoining the company's railway" to construct a suitable crossing if the owner and the railway company "do not agree on the construction of a crossing across the *railway*". The French version refers to "chemin de fer", again consistent with the English.

[106] I can conceive of no reason to give “crossing” in these two provisions different meanings, yet one provision refers to “railway line” and the other to “railway”.

[107] This difference—like the difference between the French and English versions of the definitions of “utility crossing” and “road crossing”—reinforces the proposition that both “railway” and “railway line” are capable of being construed broadly, or narrowly, depending on the context. That “railway” is sometimes used instead of “railway line” demonstrates the importance of understanding the context and purpose to determine the meaning that is appropriate to that context and purpose.

(iii) Discontinuance of railway lines

[108] The term “railway line” is used throughout the part of the *Canada Transportation Act* that prescribes the process a railway company must follow if it wants to discontinue a railway line: *Canada Transportation Act*, Part III, Division V, ss. 140-146.6.

[109] In summary, before a railway company can discontinue a railway line, it must first try to find another railway operator to buy, lease or otherwise acquire it for continued operation, failing which the railway company must offer the railway line to governments and urban transit authorities: *Canada Transportation Act*, ss. 141-145. Generally, the line is transferred at its net salvage value. In that context, if the parties cannot agree, the Agency may determine the net salvage value of the railway line: *Canada Transportation Act*, ss. 144(3.1), 145(5), 146.3(1).

[110] BNSF suggests the fact that the right of way is included in calculating the net salvage value of a railway line is "virtually conclusive of the submission that Parliament could have (if it had wanted to) included land/right of way in other parts of the [*Canada Transportation Act*], but it did not": BNSF's Memorandum of Fact and Law at para. 69.

[111] I disagree.

[112] The "net salvage value of the railway line" is not defined. However, the Agency interprets it as requiring a valuation of the related right of way because, as the Agency explained, "[c]ontrol over the land of the railway right-of-way is an integral part of the operation of a line of railway": Decision No. 467-R-1996. See also CONF-R-13-2022 at para. 10, Decision No. 43-R-2013 at para. 6; Decision No. 21-R-2013 at para. 10; Decision No. 260-R-2012 at para. 4.

[113] Thus, the Agency interprets "railway line" in this context in the same way it does in the definition of "utility crossing".

[114] The applicable provisions require the railway company to provide information about the land on which the railway line is located for the information of those interested in acquiring the railway line to be otherwise discontinued: *Canada Transportation Act*, ss. 141(2.2), (3.1), 143(3), 144(5.1), 145(1.1), (4.1).

[115] I accept that section 146.4 also provides for the separate determination of the net salvage value of a railway right of way. However, that provision is of narrow application.

[116] The process a railway company must follow to discontinue a railway line does not apply to sidings and spurs, which are excluded from the expression “railway line” for that purpose: *Canada Transportation Act*, s. 140(1). Rather, a separate, albeit similar, process governs the dismantling of sidings and spurs.

[117] A siding or spur, unless on a right of way that will continue to be used for railway operations, cannot be dismantled unless the railway company first offers to transfer the siding or spur for its net salvage value to certain governmental or quasi-governmental authorities: *Canada Transportation Act*, s. 146.2(4). Absent an agreement between the railway company and a party that seeks to accept the offer, the Agency may determine the net salvage value of the siding or spur: *Canada Transportation Act*, s. 146.2(7).

[118] Section 146.4 provides for the separate calculation of the net salvage value of a right of way located in a metropolitan area or within the territory served by an urban transit authority. However, it applies only where the right of way will no longer be used for railway operations, the sidings and spurs on it have been dismantled, and the railway company proposes to sell, lease or otherwise transfer the right of way: *Canada Transportation Act*, ss. 146.2(1), 146.3(1), 146.4. In other words, section 146.4 applies only when the property to be valued is only the right of way.

[119] Accordingly, I do not see that provision as suggesting that “railway line” does not include the railway right of way. At most, it might suggest that the right of way by itself does not constitute a railway line. However, that does not conflict with the Agency’s reasons for including

the value of the right of way in calculating the net salvage value of the railway line as defined for that purpose. Rather, it is entirely consistent with those reasons and with the fact that the process under the *Canada Transportation Act* that applies depends on whether the property at issue is the railway line, as defined for that purpose, or only a right of way no longer used in railway operations.

(iv) Other provisions in the *Canada Transportation Act* that address conflicts between railways and others

[120] In addition to section 100, other provisions in the *Canada Transportation Act* address circumstances where the interests of railways and others, including provincial and municipal governments, public authorities and private landowners, conflict. As in section 101, Parliament has established parameters for addressing conflicts within these provisions, providing additional relevant context.

[121] To the extent necessary for the construction or operation of a railway, the *Canada Transportation Act* grants a railway company significant powers to encroach on the property rights of others, subject only to the provisions of Part III of the *Canada Transportation Act* or any other Act of Parliament: *Canada Transportation Act*, s. 95. These include the power to divert or alter the course of a watercourse or road, including raising or lowering it, and to divert or alter the position of a water pipe, gas pipe, sewer or drain, or telegraph, telephone or electric line, wire or pole across or along the railway: *Canada Transportation Act*, ss. 95(1)(*b*), (*d*).

[122] The exercise of these powers is relatively unconstrained. A railway company is obligated only to minimize damage as much as possible, to compensate for actual loss or damage, and, where the railway company diverts or alters anything mentioned in paragraphs 95(1)(*b*) and (*d*), to restore it as nearly as possible to its former condition or to put it in a condition that does not substantially impair its usefulness: *Canada Transportation Act*, ss. 95(2)-(4).

[123] Here, Parliament recognized that a railway company's exercise of these powers could adversely affect the property of others and decided how any such conflict is resolved: the railway company's powers are paramount, subject to the legislated obligations described in the previous paragraph.

[124] As described above, a railway company also has obligations to a landowner whose land is divided by the construction of a railway or who owns land adjoining the company's railway if the railway impacts the owner's enjoyment of the land: *Canada Transportation Act*, ss. 102, 103. Again, Parliament recognized that a railway may adversely affect the property rights of landowners and, while not precluding the railway company from doing so, decided how such conflicts would be resolved.

[125] Finally, there are provisions concerning a railway's obligation to minimize noise and vibration and a process for addressing complaints: *Canada Transportation Act*, ss. 95.1-95.4.

[126] These provisions address circumstances in which the railway is interfering with the property of others or their enjoyment of their property. However, those responsible for roads and

utility lines—works that should be viewed as for the public good—may find it necessary to interfere with a railway company's property, as the District does here.

[127] Yet again, Parliament turned its mind to this and legislated a process to resolve such disputes. In doing so, Parliament intended that the railway company and the proponent of the road or utility line attempt to come to an agreement. If they cannot, Parliament has empowered the Agency to authorize the construction of a suitable road or utility crossing.

[128] Under BNSF's interpretation, how is its conflict with the District to be resolved? With respect, BNSF leaves this question unanswered.

(v) Constitutional context

[129] I pause here to observe that Parliament has exclusive legislative jurisdiction over federal railways: *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, Appendix II, No. 5. This includes exclusive legislative authority to prescribe the powers of federal railways and to regulate their construction, repair and management: *Canadian Pacific Railway v. Notre Dame de Bonsecours (Parish)*, [1899] A.C. 367, C.R. [12] A.C. 145 (P.C.).

[130] While a federal undertaking is not immune from provincial legislation, interjurisdictional immunity applies when provincial legislation would impair (without necessarily sterilizing or paralyzing) the federal power or undertaking: *Canadian Western Bank v. Alberta*, 2007 SCC 22 at para. 48. The doctrine of interjurisdictional immunity applies to the essential functions and parts of railway operations: *Ontario v. Canada Pacific Ltd.*, (1993), 13 O.R. (3d) 389, 103

D.L.R. (4th) 255, at 394, affirmed 1995 2 S.C.R. 1031, 125 D.L.R. (4th) 385; *Halton (Regional Municipality) v. Canadian National Railway Company*, 2024 ONCA 174, leave to appeal to SCC refused, 41248 (11 July 2024).

[131] A province has no jurisdiction to expropriate, or require a railway to permit the construction of a road or utility line on, a railway right of way subject to federal jurisdiction: *AG Alberta* at 503; *Campbell-Bennett v. Comstock Midwestern Ltd.*, [1954] S.C.R. 207, [1954] 3 D.L.R. 481 at 216; *C.N.R. v. Nor-Min Supplies*, [1977] 1 S.C.R. 322, 66 D.L.R. (3d) 366 at 324-325. See also *Westcoast Energy Inc. v. Canada (National Energy Board)*, [1998] 1 S.C.R. 322, 156 D.L.R. (4th) 456 at 356; *Vancouver International Airport Authority v. British Columbia (Attorney General)*, 2011 BCCA 89 at para. 29, leave to appeal to SCC refused, 34213 (25 August 2011); *Canadian Pacific Railway Company v. Kelly Panteluk Construction Ltd.*, 2020 SKCA 123 at para. 86; *Greater Toronto Airports Authority v. Mississauga (City)* (2000), 50 O.R. (3d) 641, 192 D.L.R. (4th) 443 (C.A.), leave to appeal to SCC refused, [2001] S.C.C.A. No. 83.

[132] This too is a relevant contextual constraint.

[133] When legislation is open to more than one interpretation, an interpretation that leads to negative consequences or an absurd result should be rejected: *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031, 24 O.R. (3d) 454 at 1081-1082; *Rizzo* at para. 27; *Porter v. Boucher-Chicago*, 2021 FCA 102 at para. 41. An interpretation that is extremely unreasonable or inequitable, illogical or incoherent, or incompatible with other provisions or with the object of the legislative enactment can be absurd: *Rizzo* at para. 27.

[134] As the District observes, given the paramountcy of Parliament over railways, under BNSF's interpretation of "railway line" no mechanism exists to resolve a dispute between a railway company and a proponent of a utility line that crosses a railway right of way, but not the tracks: District's Amended Memorandum of Fact and Law at paras. 47-48. In my view, this would be an illogical result and incompatible with Parliament's constitutional supremacy and the other provisions addressing potential conflicts between railways and others.

[135] In contrast, under the Agency's interpretation, the dispute can be resolved: in the absence of agreement between the parties, the Agency can authorize the work.

[136] This context strongly favours interpreting the definition of "utility crossing" to include utility lines that cross the railway right of way.

(vi) Other uses of "railway line" and related expressions in the *Canada Transportation Act* and *Railway Safety Act*

[137] As noted above, the contextual analysis invites a consideration of other statutes that are part of the same overarching regulatory and legislative scheme. Here, the *Railway Act* is the predecessor legislation to both the *Railway Safety Act* and Part III of the *Canada Transportation Act*, which together form part of the legislative scheme governing federal railways.

[138] The *Railway Safety Act* uses "line of railway" and "line" almost exclusively. In contrast, the *Canada Transportation Act* uses "railway line", "line of railway", "line of a railway company", "line" and "line of the railway". However, it also sometimes uses "tracks", "right-of-

way" and "rails of a railway", terms that do not appear in the *Railway Safety Act*: see, for example, *Canada Transportation Act*, s. 138(1)(*b*).

[139] There are differences between the French and English versions of provisions other than the definition of "utility crossing" in the *Canada Transportation Act*. For example, "for receiving from or carrying by its railway" in the English version of subsection 114(3) becomes "pour en recevoir et expédier par sa propre voie" in French—that is, "its railway" in English becomes "its railway line" in French.

[140] Both statutes define "railway" in identical terms and both use "railway" in circumstances where "railway line" might just as appropriately have been used: see, for example, *Railway Safety Act*, ss. 4.1, 17.31(1), 17.4(1), 22.1(2); *Canada Transportation Act*, ss. 91(2), 95(1), 103(1), 138(1)(*c*).

[141] I acknowledge that both statutes expressly refer to land adjoining the land on which a line of railway is situated and to land on which a line of railway is situated: *Railway Safety Act*, ss. 24(1), (2), 25(1); *Canada Transportation Act*, ss. 95(1)(*c*), 103(1), 114(3). However, in my view, that merely illustrates that, depending on the context, a narrower meaning of a particular term may be appropriate.

[142] As this Court observed more than 25 years ago, "it does not appear that Parliament has been rigorous in distinguishing between railways and railway lines throughout…the *Canada Transportation Act*": *Yardworks* at para. 14. I add that Parliament has also not been rigorous in

using these terms consistently in the two related Acts, nor in translating such terms from one language to another. This is particularly true in the *Canada Transportation Act* but also in the *Railway Safety Act*.

[143] This lack of rigour is symptomatic of the broad meaning of both terms and reflects the fact that the two terms can have a shared meaning, with the result that in some circumstances they are used interchangeably. Thus, whether the term used is “railway line”—as in the English version of “utility crossing”, “road crossing” and in section 102 (private crossings) in both languages—or “railway”—as in the French version of “utility crossing”, “road crossing” and in section 103 (also private crossings) in both languages—the intended meaning is the same. What that intended meaning is must be determined from the particular context in, and the purpose for, which it is used.

(vii) Conclusion on context

[144] Some provisions of the *Canada Transportation Act* use the term “railway” to refer only to a subset of the elements encompassed by its broad definition. That is equally true of the term “railway line”—it sometimes is used to refer to a subset of what is encompassed by its ordinary meaning. However, that is not always the case. The use of “railway” and “railway line” interchangeably in various provisions, including in the provisions addressing crossings, clearly demonstrates this.

[145] Thus, to determine the intended meaning of “railway line” in any particular provision, the immediate context is most instructive. Here, the most informative context is sections 100 to 103

of the *Canada Transportation Act* dealing with crossings and the *Railway Safety Act*'s use of substantially the same definitions of "utility crossing" and "road crossing". This context strongly favours interpreting "railway line" as including the right of way.

[146] Further contextual support for that interpretation includes the legislative scheme for resolving disputes between railway companies and other parties where their interests conflict, considered in light of the constitutional paramountcy Parliament enjoys over railways.

(c) *Purpose*

[147] The third consideration in the statutory interpretation exercise is purpose.

[148] BNSF says the purpose of sections 100 and 101 is clear and that the *Canada Transportation Act* "recognizes that, in Canada, railway lines and to-be-constructed utility lines will, on occasion, intersect" and this "impact[s] upon the orderly urban and economic development of Canada": BNSF's Memorandum of Fact and Law at para. 49. As a result, the legislation "provides for a consideration of the competing interests (railway and utility proponent) and where appropriate, permits the authorization of a suitable crossing with a minimum of interference to the railway and its operations": BNSF's Memorandum of Fact and Law at para. 50.

[149] BNSF then states that "[n]othing in the text, context or purpose of ss. 100 and 101(3) justify applying anything more than…the statutory definition [of "utility crossing"] and…the

ordinary meaning of the words…used by Parliament": BNSF's Memorandum of Fact and Law at para. 51.

[150] With respect, these submissions do not take the purposive analysis very far. They do little more than take us back to the text. As I have explained and *ATCO* makes clear, the ordinary meaning of "railway line"—the words used by Parliament—can include the railway right of way on which the tracks are situated. The question we face is whether "railway line" as used in the definition of "utility crossing" should be given that interpretation having regard to the text, but also to that specific context and purpose.

[151] BNSF cautions that legislation's purpose cannot be used to give jurisdiction and power to the Agency, relying on *Telus Communications Inc. v. Federation of Canadian Municipalities*, 2023 FCA 79 [*Telus*]. There, this Court applied the principle that policy objectives—purpose—cannot be relied on "to set aside Parliament's discernable intent as revealed by the plain meaning": *Telus* at para. 101, citing from *Barrie Public Utilities v. Canadian Cable Television Assn.*, 2003 SCC 28 at para. 42.

[152] In my view, *Telus* is distinguishable. In that case, the appellant sought to rely on policy directions from the federal Cabinet in support of its suggested interpretation of certain statutory language, one this Court described as "an interpretation [that]…stretches credibility" and disregards the "straightforward, common sense interpretation": *Telus* at para. 82. Those are not the circumstances here.

[153] I accept BNSF's submission that Parliament's purpose was to establish a process for considering and resolving the competing interests (of railways and utility lines) and, where appropriate, authorize construction of a utility line while minimizing the effect on railway operations.

[154] However, BNSF does not explain how, in circumstances where the utility line passes over or under the railway right of way but not the tracks, its interpretation of railway line is consistent with what it admits is Parliament's purpose. Nor does BNSF identify any other process under which those competing interests could be considered and disputes resolved.

[155] The construction and operation of railways, utility lines and roads may all serve to advance urban and economic development in Canada and, as BNSF submits, Parliament must recognize that. Parliament must also have understood that the construction and operation of one must sometimes interfere with the construction and operation of the other. There is no better evidence of that than the legislative scheme for addressing that interference.

[156] That being the case, BNSF provides no rationale for Parliament intending to distinguish a utility line that passes over or under the railway tracks from one that passes over or under the railway right of way but not the tracks. I can think of none.

[157] Rather, I conclude that Parliament intended to provide a process for balancing those competing interests and resolving disputes when a utility line passes over or under the railway right of way, regardless of whether it passes over or under the tracks. Interpreting "railway line"

in the definition of “utility crossing” as the Agency did is consistent with Parliament’s intention and purpose.

[158] In particular, where a utility line seeks to encroach on a railway right of way, regardless of whether it passes over or under the tracks, the railway company and the proponent of the utility line must attempt to come to an agreement. However, if they fail, a process for resolving the dispute exists. That is exactly what happened here.

(7) Conclusion on Statutory Interpretation

[159] Beyond asserting that “railway line” in the definition of “utility crossing” does not include the right of way, BNSF offers little rationale for its interpretation or from departing from past precedent. I disagree with BNSF’s assertion that the ordinary meaning of “railway line” cannot include the right of way. Accordingly, to discern its meaning, context and purpose play a critical role.

[160] A consideration of the context—including the constitutional context and other provisions in the *Canada Transportation Act* and *Railway Safety Act*—and purpose leads me to conclude that the Agency did not err by interpreting “railway line” in the definition of “utility crossing” as including the railway right of way.

B. *Is the Agency's Interpretation of the 1979 Contract Reviewable on Appeal?*

[161] There is no dispute that if the 1979 agreement governed the rerouting works, the Agency had no authority to grant the District permission to undertake them. However, based on its interpretation of the 1979 agreement, the Agency concluded that it did not apply.

[162] As described above, on an appeal of an Agency decision, this Court's jurisdiction is restricted to reviewing errors of law or jurisdiction. Contract interpretation is a question of mixed fact and law. Accordingly, unless the Agency made an extricable error of law in interpreting the 1979 agreement, its interpretation cannot be the subject of an appeal.

[163] The District submits that BNSF has not identified any extricable error of law in the Agency's interpretation of the 1979 agreement.

[164] I agree.

[165] BNSF asserts the Agency erred in interpreting that agreement. In particular, BNSF submits that although the 1979 agreement uses the term "reconstruct", "maintain" and "repair", the Agency did not consider whether installing the tie-in elbow fell within those terms individually or collectively. In BNSF's view, the rerouting works fall clearly within these terms. In support of its position, BNSF relies on meanings given to those terms in jurisprudence and dictionaries.

[166] However, none of these submissions identifies an error of law. Examples of extricable questions of law include the application of an incorrect principle; the failure to consider a required element of a legal test; the failure to consider a relevant factor; or a question regarding the formation of a contract: *Sattva* at para. 53, citing *King v. Operating Engineers Training*, 2011 MBCA 80 at para. 21.

[167] When interpreting a contract, "[t]he overriding concern is to determine 'the intent of the parties and the scope of their understanding'": *Sattva* at para. 47, citing *Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada*, 2006 SCC 21 at para. 27. To do so, one "must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract": *Sattva* at para. 47. However, contractual interpretation must always be grounded in the text, not the surrounding circumstances: *Sattva* at para. 57; see also *ING Bank N.V. v. Canpotex Shipping Services Limited*, 2017 FCA 47 at paras. 105-106, leave to appeal to SCC refused, 37553 (21 September 2017).

[168] Admittedly, the Agency's reasons for concluding the 1979 agreement does not apply to the rerouting works are short:

> [25] The 1979 BNSF agreement pertains to the construction of the River Road Main East watermain, a 42-inch water pipeline. The terms construct, reconstruct, maintain and repair refer to this watermain. There is nothing in that agreement that suggests it contemplates future works related to the expansion or improvement of the structure of the water supply and distribution system some 40 years later or redirection of a portion of the watermain to the

> [new chamber], which was not constructed at the time of the 1979 BNSF agreement.
>
> [26] While aspects of the rerouting works, such as the abandonment of a portion of the watermain, may physically affect the [East] watermain, the Agency finds that the rerouting works are a new project that was not contemplated by the 1979 BNSF agreement.
>
> [27] For the above reasons, the Agency finds that it has authority to decide the application. Regardless of whether the parties are bound by the 1979 agreement, the Agency fins that the agreement does not prevent it from deciding this application.

[169] However, the only relevant question is whether the reasons reflect an application of the principles of contractual interpretation. In my view they do.

[170] The Agency describes the 1979 agreement as pertaining to "the construction of the River Road Main East watermain, *a 42-inch water pipeline*" (emphasis added). In the next sentence, the Agency states "[t]he terms construct, reconstruct, maintain and repair refer to *this* watermain": Decision at para. 25 (emphasis added).

[171] I pause to observe that the District's application included design drawings and specifications for a 36-inch tie-in elbow: Appeal Book at 54-57. The application and design drawings highlight the location of that tie-in elbow, the new watermain heading north from it to the new chamber, the portion of the East watermain to be abandoned, and the existing chamber to be modified in light of that abandonment.

[172] I also observe that, under the 1979 agreement, BNSF granted the District "license and permission to excavate for, construct, maintain and operate *a 42-inch water pipeline,* hereinafter referred to as *the 'facility,'* upon, along or across the right of way of [BNSF]…*to be located as shown in red on the plan hereto attached*": Appeal Book at 41 (emphasis added). Throughout the 1979 agreement, the terms "construct", "maintain" and "repair" are used in relation to "the facility" or "said facility".

[173] Returning to the Agency's reasons, it then states "[t]here is *nothing in [the 1979] agreement* that suggests it contemplates future works related to the expansion or improvement of the structure of the water supply and distribution system…or redirection of a portion of the watermain": Decision at para. 25 (emphasis added). The Agency thus considered the agreement in its entirety, and in particular what the parties intended by using the words "construct", "reconstruct", "maintain" and "repair" in that agreement.

[174] The Agency then acknowledges the rerouting works may physically affect the East watermain, but finds those works to be "a new project that was not contemplated by the 1979 BNSF agreement": Decision at para. 26. In other words, it concludes the parties to that agreement did not contemplate the rerouting works and so those parties cannot have intended that the agreement apply in the circumstances.

[175] I accept that BNSF does not agree with that interpretation. However, BNSF has not established that the Agency made an extricable error of law. Accordingly, the Agency's interpretation is not reviewable by this Court on appeal: *Canada Transportation Act*, s. 41(1).

[176] I contrast this with the appeal of another Agency decision heard at the same time as this appeal: Decision No. 14-R-2023 (the Agency Sewerage Decision). In that appeal, BNSF also asserted that an existing agreement governed and that the Agency erred in interpreting that agreement by failing to apply the correct principles of contractual interpretation. This Court agreed: *BNSF Railway Company v. Greater Vancouver Sewerage and Drainage District*, 2025 FCA 12.

[177] However, unlike the circumstances here, the Agency Sewerage Decision did not reflect an analysis of the text of the agreement with a view to determining what the parties intended. Rather, it reflected the Agency's own interpretation of "maintain" and "repair" without explaining why that interpretation reflected the meaning the parties to that agreement intended when they used them. For reasons I have explained, those are not the circumstances here.

V. Costs

[178] The Agency does not seek costs but submits it should not be liable for costs.

[179] Both the District and BNSF seek costs of the appeal and of the motion for leave to appeal. However, the order granting leave awarded costs of that motion, and therefore those costs cannot be addressed on this appeal.

VI. Conclusion

[180] I agree with the Agency that "railway line", as used in the definition of "utility crossing" in the *Canada Transportation Act*, includes the railway right of way contiguous to a railway's tracks. That interpretation is consistent with the text, context and purpose of sections 100 and 101 of the *Canada Transportation Act*.

[181] Moreover, BNSF has not identified any error of law in the Agency's interpretation of the 1979 agreement. Accordingly, on an appeal of the Decision, we have no jurisdiction to consider that interpretation.

[182] Therefore, I would dismiss the appeal and order BNSF to pay the District its costs of the appeal.

"K.A. Siobhan Monaghan"
J.A.

"I agree.
Donald J. Rennie J.A."
"I agree.
Anne L. Mactavish J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-255-22
STYLE OF CAUSE:	BNSF RAILWAY COMPANY v. GREATER VANCOUVER WATER DISTRICT, CANADIAN NATIONAL RAILWAY COMPANY AND CANADIAN TRANSPORTATION AGENCY
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
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REASONS FOR JUDGMENT BY:	MONAGHAN J.A.
CONCURRED IN BY:	RENNIE J.A. MACTAVISH J.A.
DATED:	JANUARY 17, 2025

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